INDEX

	Page
Jurisdiction	3
Reason for Petition for Rehearing	4
The Controlling Question	5
Public Importance	6
Conclusion and Prayer	6
Certificate	7

CITATIONS

CASES:

Commissioner v. Kennedy Mining & Milling Co., 125 F. (2d) 399	4
Herring v. Commissioner, 293 U. S. 322, 55 S. Ct. 179, 79 L. Ed. 389	5
Kirby Petroleum Co. v. Commissioner, 326 U. S. 599, 603-604, 66 S. Ct. 409, 90 L. Ed. 343	5
Lynch v. Alworth-Stephens Co., 267 U. S. 364, 45 S. Ct. 274, 69 L. Ed. 660	5, 6
New Idria Quicksilver Mining Co. v. Commissioner, 144 F. (2d) 918	5
Palmer v. Bender, 287 U. S. 551, 53 S. Ct. 225, 77 L. Ed. 489	5

STATUTE:

Rule 33, 28 U.S.C.A. 354	3
Internal Revenue Code, Sec. 23 (m) and 114 (b) (4) (A) and (B)	4

II.

REASON FOR PETITION FOR REHEARING

1. The petition for certiorari of the London Extension Mining Company in No. 693 was consolidated with petitions of its affiliated company Chicago Mines Co. in docket No. 691, and also with No. 692 which covered the same issues as No. 691 except that 692 represents The London Extension Mining Company's liability as transferee of Chicago Mines Co.

2. On re-analysis, it will be seen that the issue in No. 693 is materially distinct from those in Nos. 691 and 692, and we respectfully ask that a rehearing on the petition of The London Extension Mining Company in No. 693 for a writ of certiorari be granted; and that for this purpose the cases be separately considered.

3. The London Extension Mining Company, by virtue of its ownership at all times here involved of a substantial interest (one-half) in the mine and mining property from which the ore question was derived, is being erroneously denied its statutory right to a depletion allowance, unless this Court grants this petition for a rehearing.

4. Said error lay in holding as to the petitioner The London Extension Mining Company that its mine and its mine dump were two separate properties, and that its income when derived either as royalties from ore mined by its lessee Chicago Mines Company (petitioner in Docket No. 691) or from its own operation of its mine and dump during the same taxable period could not be added together to form the base "as income from the property" for calculating percentage depletion, in accordance with the provisions of section 23 (m) and 114 (b) (4) (A) and (B) of the Internal Revenue Code.

5. The Circuit Court of Appeals decision in No. 693, is in direct conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in *Commissioner* v. *Ken-*

nedy Mining & Milling Co., 125 F. (2d) 399, and *New Idria Quicksilver Mining Co.* v. *Commissioner*, 144 F. (2d) 918.

The Brief for Respondent in Opposition, at page 15, admits:

> "The judgment in No. 693, may be out of harmony with the principles applied by the Circuit Court of Appeals for the Ninth Circuit * * *."

6. A correct ruling, in accordance with recent decisions of this Court, would have required a different disposition of the case.

Kirby Petroleum Co. v. *Commissioner*, 326 U. S. 599, 603-604, 66 S. Ct. 409, 90 L. Ed. 343,

Herring v. *Commissioner*, 293 U. S. 322, 55 S. Ct. 179, 79 L. Ed. 389,

Palmer v. *Bender*, 287 U. S. 551, 53 S. Ct. 225, 77 L. Ed. 489,

Lynch v. *Alworth-Stephens Co.*, 267 U.S. 364, 45 S. Ct. 274, 69 L. Ed. 660.

III.

THE CONTROLLING QUESTION

The controlling question therefore is whether The London Extension Mining Company as fee owner and operator, or as fee owner and lessor of the American Mine and American Mine Dump, is entitled to a depletion allowance on income derived during the taxable period from ores that originated in its own mine and which had never left its mining property, until sold during the taxable period in question.

And on that question the negative holding of the Circuit Court of Appeals, 10th Circuit, herein is in direct conflict with the applicable decisions of this Court, *supra*, as well as with the decisions of the Circuit Court of Appeals for the Ninth Circuit.

This Court has said:

"We agree with the Circuit Court of Appeals (294 Fed. 194) that 'the plain, clear and reasonable meaning of the statute seems to be that the reasonable allowance for depletion in case of a mine is to be made to everyone whose property right and interest therein has been depleted by the extraction and disposition of the product thereof which has been mined and sold during the year for which the return and computation are made. And the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.'"

Lynch v. *Alworth-Stephens Co.* (1925), 267 U. S. 364, 369-370, 45 S. Ct. 274, 69 L. Ed. 660, 662.

IV.

PUBLIC IMPORTANCE

The record presents an important federal question involving the Internal Revenue Code and the legislative policy regarding the production of metals, pertaining to the national interest, which should be reviewed and decided by this Court.

V.

CONCLUSION AND PRAYER.

For the foregoing reasons, the petitioner The London Extension Mining Company (Docket No. 693) respectfully urges that a rehearing be granted; that upon further consideration the order of April 26, 1948, denying the petition for certiorari be revoked; and that the writ of certiorari issue.

FRAZER ARNOLD,
730 First National Bank Bldg.,
Denver 2, Colorado.
Attorney for Petitioner.

CHARLES KENTOR,
ARNOLD WEINBERGER,
730 First National Bank Bldg.,
Denver 2, Colorado,
Of Counsel.

CERTIFICATE

I, Frazer Arnold, counsel for the above-named petitioner The London Extension Mining Company, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay; and that the petition is restricted to the substantial ground available to petitioner although not previously presented and emphasized that No. 693 is sharply differentiated in its facts and ownership from Nos. 691-2 and that the respondent admitted, on page 15 of his Brief in Opposition, that, "The judgment in No. 693 may be out of harmony with the principles applied by the Circuit Court of Appeals for the Ninth Circuit * * *."

FRAZER ARNOLD,
730 First National Bank Bldg.,
Denver 2, Colorado,
Attorney for Petitioner.